amount of the stakeholder's charge is disputed, the bill will not lie;[12] but it is otherwise if the claim is available against and admitted by both defendants.[13] The result should be the same where the lien is available against only one of the defendants, if he does not dispute it. Hence this requirement is really covered by the second above. 9. The stakeholder must have incurred no collateral or independent liability to either claimant;[14] since, it is argued, one of the claimants may be subjected to two suits to enforce his rights. On the contrary — and this seems to be the better and more modern view — the bill will settle once and for all the ownership of the *res;* and it may settle the whole controversy.[15] The fact of the collateral liability is immaterial and relief should therefore be granted. 10. Lastly, it is insisted that the same thing, debt, or duty, must be claimed by all the defendants.[16] This however seems unnecessarily refined in its technicality. So long as the claims are mutually exclusive, and the stakeholder is willing to bring into court the full amount claimed by either, it would seem that he should be entitled to maintain his bill. And indeed in a few cases it has so been held.[17]

CONVERSION OF A MORTGAGE INTO AN ABSOLUTE CONVEYANCE. — Where a deed absolute in its terms is given as security for a debt and simultaneously there is executed an agreement of defeasance the two instruments will be construed together as a mortgage;[1] and if they do not refer to each other parol evidence may be introduced to connect them.[2] Indeed, if the deed be given as security it will be treated as a mortgage though there be no written defeasance contract.[3] Although the admission of parol evidence to establish a mortgage would seem to contradict the deed in violation of the parol evidence rule, it may be justified as preventing fraud and unjust enrichment.[4] However, the presumption from an absolute deed is that it operates according to its terms, and it has even been held that an oral defeasance agreement must be established beyond reasonable doubt.[5]

At common law a mortgage, whatever its form, vests the legal title to the land in the mortgagee subject to an equity in favor of the mortgagor.[6] Where the defeasance agreement is separate from the deed, this equity of redemption may be extinguished and the conveyance made absolute without a formal release or a new deed. If the defeasance is not in writing a parol agreement whereby the mortgagee is to be regarded as the unconditional owner will be effective.[7] While if the defeasance is in a written instrument an agreement that the mortgagee shall take an absolute fee,[8] or a

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[12] Lawson *v.* Warehouse Co., 70 Hun (N. Y.) 281.
[13] Gibson *v.* Goldthwaite, 7 Ala. 281.
[14] Bartlett *v.* His Imperial Majesty, 23 Fed. 257; Crawshay *v.* Thornton, 2 My. & C. 1. *Contra*, Attenborough *v.* London, etc., Co., 3 C. P. D. 450 (statutory).
[15] See *In re* Mersey Docks, [1899] 1 Q. B. 546.
[16] Slaney *v.* Sidney, 14 M. & W. 800. See 4 Pomeroy, Eq. Jurisp., 3 ed., § 1323.
[17] Thomson *v.* Ebbets, Hopk. Ch. (N. Y.) 272.

[1] Mooney *v.* Byrne, 163 N. Y. 86.
[2] Gay *v.* Hamilton, 33 Cal. 686.
[3] Preschbaker *v.* Heirs of Feaman, 32 Ill. 475.
[4] See Bank *v.* Sprigg, 1 McLean (U. S.) 178, 184.
[5] Ensign *v.* Ensign, 120 N. Y. 655.
[6] Hunt *v.* Hunt, 14 Pick. (Mass.) 374, 382.
[7] Shaw *v.* Walbridge, 33 Oh. St. 1; Cramer *v.* Wilson, 202 Ill. 83.
[8] Scanlan *v.* Scanlan, 134 Ill. 630.

surrender of the instrument with intent that it be cancelled,[9] will convert the mortgage into an absolute conveyance. *A fortiori*, an abandonment of his right of redemption by the mortgagor and an acceptance of a lease of the premises from the mortgagee has the same effect.[10] However, the relation between the mortgagor and the mortgagee is so far fiduciary that courts will carefully scrutinize such transactions[11] and the right of redemption will be regarded as extinguished only by an agreement founded on adequate consideration and free from suspicion of fraud.[12] The conversion of a mortgage into an absolute conveyance in this manner is not by way of transfer; for the mortgagee already has the legal fee. Nor is it strictly speaking a release. Some courts work it out on the theory of estoppel, through the surrender of the legal evidence of the mortgagor's claim,[13] but it seems sufficient to say that it would be inequitable to allow the mortgagor to redeem.[14] Nor does the rule contravene the Statute of Frauds.[15]

Through an unfortunate confusion of legal and equitable principles a small majority of American jurisdictions have abrogated the common law doctrine and hold that a mortgage does not pass the legal title to the mortgagee.[16] Of these so-called "lien states," Georgia, Iowa, Michigan, and Nebraska hold that where the defeasance agreement is not contained in the deed title does pass. In these states such mortgages should be convertible into absolute conveyances as in common law jurisdictions.[17] In New York, however, it was recently held that the physical destruction of the instrument of defeasance under a valid agreement that the mortgagee should have the absolute estate did not destroy the right of redemption. *Conover* v. *Palmer*, 60 N. Y. Misc. 241. Such a holding, though seemingly undesirable, is but the logical result of an illogical doctrine. If the title did not pass by the original deed it is difficult to see how it can do so later by parol agreement or by the destruction of a collateral instrument. The legal estate, being in the mortgagor can only be divested by foreclosure or by a conveyance executed according to statutory requirements.[18] However, some of the "lien states" have refused to be consistent,[19] and it is conceivable that in some circumstances the mortgagor should be estopped to deny the mortgagee's title.[20]

NECESSITY AS AN EXCUSE FOR A TRESPASS UPON LAND. — Since the earliest times there have been many well-recognized exceptions to the rule that any unauthorized entry upon the land of another is an actionable trespass. Hence the subjection to excusable entries must be regarded as one of the reasonable burdens of property ownership. The legal justifica-

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[9] Trull *v.* Skinner, 17 Pick. (Mass.) 213.
[10] Seymour *v.* Mackay, 126 Ill. 341; Jordan *v.* Katz, 89 Va. 628.
[11] See 21 HARV. L. REV. 459, 464. *Cf.* Villa *v.* Rodriguez, 12 Wall. (U. S.) 323.
[12] Cassem *v.* Heustis, 201 Ill. 208.
[13] See Trull *v.* Skinner, *supra*, 215. *Cf.* Commonwealth *v.* Dudley, 10 Mass. 402.
[14] West *v.* Reed, 55 Ill. 242.
[15] McMillan *v.* Jewett, 85 Ala. 476. *Contra*, Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187.
[16] Barry *v.* Hamburg-Bremen Ins. Co., 110 N. Y. 1.
[17] Baxter *v.* Pritchard, 122 Iowa 590; Stall *v.* Jones, 47 Neb. 706. But see Thompson *v.* Mack, Harr. (Mich.) 150.
[18] Odell *v.* Montross, 68 N. Y. 499; Keller *v.* Kirby, 34 Tex. Civ. App. 404; Brinkman *v.* Jones, 44 Wisc. 498.
[19] Shubart *v.* Stanley, 52 Ind. 46, 51; Wilson *v.* Carpenter, 62 Ind. 495.
[20] See Odell *v.* Montross, *supra*. But see Howe *v.* Carpenter, 49 Wisc. 697.